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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IDA GASTON,

Petitioner,

—vs.—

VICLO REALTY COMPANY and LEO MALLAH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Petitioner's personal injury action against the defendants was properly brought in the Supreme Court of the State of New York. Although the petitioner was entitled to a fair trial by jury and to due process and equal protection of the law under the United States and New York State Constitutions, petitioner was denied these civil rights because the state courts: a) failed to follow precedents of the United States Supreme Court which have granted new trials where counsel has willfully and repeatedly uttered false statements before a jury, thereby depriving a party of a fundamentally fair trial; and b) resurrected and retroactively applied long discarded legal doctrines, depriving petitioner of her right to rely upon state statutory provisions that were in effect at the time of the trial and did so to petitioner herein and not to all others similarly situated.

QUESTIONS PRESENTED

1. Whether the state courts may disregard without discussion or comment this Court's binding precedents regarding due process and fundamental fairness, or whether the state courts shall be compelled to follow the same?

2. Does the state court's refusal to grant a new trial, notwithstanding petitioner's having been denied a fair trial, constitute deprivation of due process under color of state law in violation of 42 U.S.C. Sec. 1983?

3. Is a severely injured person entitled to a new trial where the defense trial attorney, engineer, and radiologist expert conspired to impede, hinder and defeat the obtaining of a just verdict in violation of 42 U.S.C. Sec. 1985?

4. Whether the petitioner was denied due process and equal protection of the law because the state courts refused to grant petitioner a new trial notwithstanding defense counsel's multiple, false, highly prejudicial statements, which deprived petitioner of her right to a fair trial and which violated precedents of the state courts and of this Court?

5. Whether the highest court of a state may disregard without discussion or comment its own precedent and the state legislative scheme as well as the separation of powers objection raised before it?

6. Whether the petitioner was denied due process and equal protection of the law because the state courts violated the separation of powers and failed to follow precedents and state law which required them to grant plaintiff a new trial due to the clearly inconsistent verdict?

7. Whether the petitioner was denied due process and equal protection of the law because the state courts violated the separation of powers and resurrected and retroactively applied to petitioner the long discarded doctrine of contributory negligence instead of the scheme of comparative negligence required by state law?

LIST OF PARTIES

The caption contains the names of all parties who appeared in the proceeding in the court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The decision and order of the New York State Supreme Court, Appellate Division, First Department, is officially reported as *Gaston v. Viclo Realty Co.*, 215 A.D.2d 174, 626 N.Y.S.2d 131 (1st Dept. 1995). It was issued on May 9, 1995 and served with notice of entry on October 11, 1995. It appears in App. 1a-3a. The petitioner's motion for reargument, or, in the alternative, for leave to appeal to the New York State Court of Appeals, pursuant to N.Y. Civ. Prac. L. & R. 5602(a)(1)(i), was denied by the Appellate Division in an order dated September 14, 1995 and served with notice of entry on October 11, 1995. A copy of this order, which is not officially reported, appears in App. 7a-9a. The unreported bench decision of the New York State Supreme Court for New York County, as transcribed by the court reporter, was issued on March 3, 1994 and is reproduced in App. 5a-6a. The unreported order of the New York State Supreme Court for New York County was issued on March 23, 1994 and is reproduced in App. 4a.

JURISDICTION

The petitioner's motion directly to the Court of Appeals of New York for discretionary review (leave to appeal) pursuant to N.Y. Civ. Prac. L. & R. 5514 and 5602(a)(1)(i) was denied by the Court of Appeals on December 27, 1995. The denial, which is not officially reported but appears on LEXIS at 1995 N.Y. LEXIS 5042, is reproduced in App. 10a.

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the date of denial of discretionary review (leave to appeal). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1995) because the decision and order of the Appellate Division sought to be reviewed raises questions of denial of petitioner's rights to a fair trial, due process, and equal protection of the law under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The civil rights statute 42 U.S.C. Sec. 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The civil rights statute 42 U.S.C. Sec. 1985 provides in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

> under the laws; . . . the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

The important issues raised by this case are whether a petitioner who brings a civil personal injury suit in the state courts is denied her civil rights to a fair trial and to due process and equal protection of the laws, under the Fifth and Fourteenth Amendments to the United States Constitution, when the state courts: a) failed to follow precedents of the United States Supreme Court which have granted new trials where counsel has willfully and repeatedly uttered false statements before a jury, thereby depriving a party of a fundamentally fair trial; and b) resurrected and retroactively applied long discarded legal doctrines, depriving petitioner of her right to rely upon state statutory provisions that were in effect at the time of the trial and did so to petitioner herein and not to all others similarly situated.

The Fifth and Fourteenth Amendments to the Constitution guarantee that the petitioner will not be deprived of life, liberty, or property without due process of law and that no state shall abridge the petitioner's privileges and immunities, deprive the petitioner of life, liberty, or property without due process of law, or deny the petitioner equal protection of the laws. The state courts of New York have misapplied the law and have applied the wrong law so as to deny the petitioner her lawful rights to a fair trial, due process, and equal protection of the laws.[1] Supervision and review by this Court are requested.

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[1] The petitioner raised the issues of the denial of her federal constitutional rights, including her right to a fair trial, at p. 5 of her January 11, 1995 main brief to the Appellate Division; at pp. 20, 23, 26 n.17, 27-28 of her March 9, 1995 reply brief; at p. 34 para. 92, p. 40 para. 101,

A. Background

The petitioner, a sixty-one year old retiree, has a medical history of heart problems, hypertension, asthma, obesity and diabetes. Because of her diabetes and to prevent infection, she was required to visit her podiatrist every other month. The office was located in a building owned by the respondents located at 331 East 115th Street, New York, New York ("the premises"). A ramp was located in front of the sole doorway to and from the premises.

On May 24, 1990, the petitioner visited her podiatrist for her bi-monthly appointment. The podiatrist testified at the trial that the petitioner had no difficulty walking that morning. In order to exit the building, the petitioner was required to push the outside door out. Before she stepped onto the ramp she stopped and looked at it. As she pushed the door open, she took one step forward with her left foot. As she took her next step, she testified that it was "like there was nothing there" and she fell. She had nothing to hold onto as she fell. After her fall, the petitioner felt pain from her lower back down and believed that she had broken her leg.

The petitioner remained on the ground for approximately fifteen (15) minutes, until the ambulance arrived. The petitioner was transported to the hospital, where x-rays were taken. Approximately two days later, the petitioner went to see an orthopedist. The orthopedist x-rayed her knees and performed a physical examination. He also prescribed an MRI scan for the petitioner's knee and lower back. The MRI disclosed that petitioner's right knee had a 50 percent tear of the anterior cruciate ligament. The orthopedist determined that the tear of the ligament was related to the incident of May 24,

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p. 41 paras. 102, 103, p. 42 para. 104, and p.44 of her June 7, 1995 motion to the Appellate Division for reargument or in the alternative for leave to appeal to the Court of Appeals; and at pp. 36, 37, 41, 42, 48-50 of her October 30, 1995 motion for leave to appeal to the Court of Appeals.

1990. He also attributed a herniation of one of the disks in the petitioner's back to the incident.

The respondents' orthopedist agreed with the petitioner's orthopedist's findings that the tear of the ligament was related to the accident and testified that the petitioner had additional orthopedic problems which were attributable to the accident.

It was also established that sound engineering principles require the maximum grade for ramps as one inch in eight (i.e., a ramp should only rise one inch for every eight inches of length). However, petitioner's engineering expert testified that the subject ramp had a grade of only one in four. He established that the subject ramp was twice as steep than the maximum grade, which would make it very difficult for pedestrians to navigate the ramp.

The engineer further established that the ramp had a length of only two feet, compared to the minimum required length of three feet. In addition, the door improperly swung over the incline of the ramp; good practice requires a level area or platform which is at least as wide as the door swing (or approximately three feet).

The subject ramp also had no handrails. According to the New York City Building Code, any ramp having a slope steeper than one in twelve is required to have a handrail. The ramp also failed to have any warning devices, which would alert a pedestrian to the ramp. The defective design of the ramp caused a "violation of expectations." Petitioner's engineer concluded that the defective design of the ramp had caused the petitioner to fall.

Counsel for the respondents elicited testimony from respondents that the respondents' engineer could not have built a ramp according to code and that building a proper ramp at that location would have been unfeasible, although counsel and his engineer were well aware that modifications, including a handrail, had been constructed approximately one year after the petitioner's injury. Over petitioner's objection, the

trial court refused to admit into evidence a photograph showing post-accident modifications that would have belied these untrue assertions.

The respondents' engineering expert also stated that it would have been unfeasible for the respondents to build a proper ramp. However, he agreed that a ramp which was not quite as steep would be a safe ramp for patients exiting the premises and that a handrail might benefit the people using the ramp. He also agreed that the required standard for ramps according to the New York City Building Code is one in eight.

The evidence overwhelmingly established that the ramp was defectively designed and that the defective design was a proximate cause of the petitioner's fall. Also, it was undisputed that it happened on the ramp. Even defense counsel conceded such in his opening statement.

B. Prior Proceedings

This civil personal injury action was instituted in the Supreme Court of New York, County of New York, by service of a summons and complaint dated April 5, 1991. The jury trial of this matter commenced on February 28, 1994.

After the court charged the jury, the jury deliberated for approximately two hours on written interrogatories. It returned a verdict which found the respondents negligent, but that such negligence was not a proximate cause of the injuries sustained by the petitioner. The jury never reached that portion of the verdict sheet which addressed any possible negligence on the part of the petitioner.

After the trial court discharged the jury, petitioner's counsel made a motion to set aside the verdict as against the weight of the credible evidence and for judgment notwithstanding the verdict. The court denied both applications. (App. 5a-6a).

The petitioner then, by Order To Show Cause dated March 21, 1994 and returnable March 23, 1994, moved for an order directing the entry of judgment in favor of the petitioner notwithstanding the jury verdict of March 3, 1994, or, alternatively setting aside the verdict and granting petitioner the right to a new trial on grounds, *inter alia*, that: the jury verdict was hopelessly inconsistent; the trial court should have found proximate cause as a matter of law; defense counsel intentionally confused the jury by repeatedly misstating the facts and misrepresenting the law of proximate cause; the jury was misled into applying the defunct law of contributory negligence instead of the present doctrine of comparative fault; defense counsel prejudiced the jury against the petitioner by arguing (contrary to the facts) that the petitioner was not looking where she was going when she stepped onto the ramp, by stating that there can only be one proximate cause of an accident and by stating that there was a failure of proof and a worst inference to be drawn from not calling to the stand the radiologist from the hospital where the MRI was performed, even though no missing witness charge was requested or given (and even though defense counsel's expert radiologist was in court and reviewed the films before the jury came in and was sent home without testifying); defense counsel implied that petitioner's orthopedist had committed malpractice and that the petitioner's injuries were due to such purported malpractice (even though the law clearly holds defendant responsible for any injury enhancement due to malpractice); defense counsel fabricated the theory that the tenants of the building requested the ramp and in fact prescribed its design, thereby improperly shifting liability onto the tenants; defense counsel argued that petitioner's treating physician committed malpractice; and defense counsel misrepresented petitioner's injuries as minor by stating that she was not claiming lost earnings, although it had already been established that the petitioner was retired.

The trial court issued a written order dated March 23, 1994 denying the petitioner's request in its entirety, and denying any relief requested by the respondents. (App. 4a).

On or about April 13, 1994, the petitioner filed her notice of appeal to the Appellate Division, First Department. In her brief, petitioner argued, *inter alia*, that: the trial court erred in failing to enter judgment notwithstanding the verdict or in ordering a new trial where the jury's verdict was clearly inconsistent and against the weight of the evidence, where proximate cause was established as a matter of law, and where defense counsel made repeated improper and prejudicial statements which denied petitioner's right to a fair trial. In her reply brief, petitioner reasserted these arguments and continued to press her position that the misstatements and misrepresentations of defense counsel and the erroneous rulings below confused the jury and deprived her of her right to a fair trial on the evidence presented in accordance with and within the bounds of the law.

The decision and order of the Appellate Division dated May 9, 1995 unanimously affirmed the trial court's denial of petitioner's motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial. (App. 1a-3a). The Court concluded that the jury could have found that the petitioner had fallen because she was inattentive and not because of the defective design of the ramp. With regard to petitioner's other arguments, the Court merely stated that it considered them and found them to be without merit.

The petitioner then moved for reargument, or, in the alternative, for leave to appeal to the New York Court of Appeals from the May 9, 1995 Order. The petitioner served the notice of motion upon the respondents on June 8, 1995. In her motion papers, the petitioner explained that, in affirming the order of the trial court, the Appellate Division apparently overlooked or misapprehended crucial facts and points of law. The petitioner argued that, *inter alia*, where, as here, evidence

as to an accident is undisputed, the courts should have followed binding Court of Appeals precedent and found proximate cause as a matter of law; the courts should not have resurrected and retroactively applied the long discarded doctrine of contributory negligence to preclude plaintiff from any recovery; and the courts should not have affirmed an irreconcilably inconsistent verdict that confounded the issues of proximate cause and comparative negligence and that was premised on a record replete with improper and highly prejudicial comments by defense counsel. The petitioner reasserted her position that the misconduct of defense counsel was so pervasive and prejudicial to the petitioner that she was deprived her of her constitutional right to a fair trial.

This motion was denied without opinion by the Appellate Division, First Department, by Order entered on September 14, 1995 and served with Notice of Entry on October 11, 1995. A copy of this Order appears in App. 7a-9a.

Thereafter, on or about October 30, 1995, the petitioner made a motion for leave to appeal (and supporting Jurisdictional Statement) to the New York Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5514 and 5602(a)(1)(i), on the grounds, *inter alia*, that the Appellate Division, First Department, erred in not finding proximate cause as a matter of law as required by binding precedents of the Court of Appeals, in essentially applying rules pertinent to the obsolete and defunct scheme of contributory negligence rather than those relevant to comparative negligence as required by state law, and in failing to reverse and vacate the jury verdict and to order a new trial where defense counsel made repeated improper and prejudicial statements which denied petitioner's constitutional right to a fair trial.

On December 27, 1995, the Court of Appeals denied the petitioner's motion without opinion. A copy of this decision appears in App. 10a.

REASONS FOR GRANTING THE WRIT

The defense attorney,[2] his engineer, and defendant's expert radiologist conspired to deprive the petitioner of a just verdict in violation of 42 U.S.C. Secs. 1983 and 1985. The state courts of New York have denied petitioner her lawful right to a fair trial by a) failing to follow precedents of the United States Supreme Court which have granted new trials where counsel has willfully and repeatedly uttered false statements before a jury, thereby depriving a party of a fundamentally fair trial; and b) resurrecting and retroactively applying long discarded legal doctrines, depriving petitioner of her right to rely upon state statutory provisions that were in effect at the time of the trial and did so to petitioner herein and not to all others similarly situated. Supervision and intervention by this Court are requested.

I.

In the interests of justice and to afford petitioner her constitutional right to a fair trial, the petitioner urges this Court to grant certiorari. The record amply demonstrates that every possible conclusion the jury could have drawn in finding no proximate cause could have only occurred from defense counsel's various instances of improper behavior.[3] Even if one area existed (which it does not) in which it could be argued that

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[2] All references to defense counsel in this Petition are to the actual defense trial counsel Mr. O'Hare who, on information and belief, is no longer with the counsel of record for respondents, the law firm of Jeffrey Samel & Associates. On information and belief, Jeffrey Samel, Esq., has an exemplary reputation in the bar.

[3] Under well-settled law, the fact that petitioner's attorney may not have timely and properly preserved and raised all objections to defense counsel's misconduct is outweighed by the prejudice of such misconduct and by the fundamental error of not declaring a mistrial and granting the petitioner a new trial. *See, e.g., Rivera v. Bronx-Lebanon Hosp. Ctr.*, 70 A.D.2d 794, 417 N.Y.S.2d 79 (1st Dept. 1979).

the jury decided a certain way not due to defendants' improper conduct, it is submitted that where there are multiple other explanations for the jury's decision, all of which have to do with defendants' improper conduct, justice cries out for a new trial. If a record is replete with instances demonstrating that a plaintiff was prejudiced and could have been thrown out of court due to multiple aspects of improper conduct of defense counsel, should the verdict stand merely because there may be one untainted explanation? The egregious violation of petitioner's fundamental right to a fair trial should not be permitted to stand on such a tenuous basis.

It is submitted that the petitioner is entitled to the benefit of the doubt and that justice requires that defense counsel be required to overcome a presumption that improper behavior affected the jury. The petitioner should be entitled to Supreme Court review of the issues of defense misconduct and how the misconduct in this case could have prejudiced the jury. As this Court affirmed in *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 318-319, 49 S.Ct. 300, 73 L.Ed. 706 (1929):

> The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power an duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. [citations omitted] Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error. [citation omitted].

If this Court agrees that there was misconduct of such a nature as to prejudice the jury and deprive the petitioner of her constitutional right to a fair trial, justice dictates a new

trial even if there were one non-tainted explanation. The defense's medical expert as well as the plaintiff's agreed that the petitioner sustained an injury on the ramp and that she has a permanent condition from the same. The trial took less than two weeks. The petitioner will be suffering for the next twenty years or more.

As stated, *supra*, defense counsel intentionally confused the jury by repeatedly misstating the facts and misrepresenting the law of proximate cause. The jury was misled into applying the defunct law of contributory negligence instead of the present doctrine of comparative fault. Defense counsel prejudiced the jury against the petitioner by arguing (contrary to the facts) that the petitioner was not looking where she was going when she stepped onto the ramp, by stating that there can only be one proximate cause of an accident and by suggesting that there was a failure of proof because the petitioner failed to call the radiologist who reported the MRI results, even though no missing witness charge was requested or given.[4] Defense counsel also implied that petitioner's orthopedist had committed malpractice and that the petitioner's injuries were due to such purported malpractice; defense counsel fabricated the theory that the tenants of the building requested the ramp and in fact prescribed its design, thereby

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[4] Defense counsel asserted at trial that there was a failure of proof because the petitioner had failed to call as a witness the radiologist who reported the MRI results and that the jury was entitled to draw every possible negative inference from this witness's absence. These comments clearly warranted reversal. It was improper for defense counsel to, in effect, instruct the jury on what constitutes a missing witness charge when he never requested such a charge prior to the summation. These comments were particularly egregious in light of the fact that, immediately prior to the summation, defense counsel discussed the film with his own radiologist, an expert under his control who was in court ready to testify. Defense counsel then sent his radiologist home without calling her to testify. Defense counsel then proceeded with his summation to the jury during which he accused the petitioner of hiding her radiologist! Such conduct was highly prejudicial to the petitioner and should not have been permitted.

improperly shifting liability onto the tenants; defense counsel argued that petitioner's treating physician committed malpractice; and defense counsel misrepresented petitioner's injuries as minor by stating that she was not claiming lost earnings, although it had already been established that the petitioner was retired.

The cumulative effect of defense counsel's remarks and conduct warrants a reversal or a new trial. Established precedent of this Court, the New York Court of Appeals and Appellate Divisions so dictates. *See*, *New York Central Railroad Co. v. Johnson*, *supra*; *DiMichel v. South Buffalo Railway Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1, 604 N.E.2d 63 (1992), *cert. denied* 114 S.Ct. 68; *Rodriguez v. New York City Housing Authority*, 618 N.Y.S.2d 352 (1st Dept. 1994); *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 558 N.Y.S.2d 511 (1st Dept. 1990); *Bagailuk v. Weiss*, 110 A.D.2d 284, 494 N.Y.S.2d 205 (3d Dept. 1985); *Bishin v. New York Central Railroad Co.*, 20 A.D.2d 921, 249 N.Y.S.2d 778 (2d Dept. 1964); *Milio v. Railway Motor Trucking Co.*, 257 A.D. 640, 15 N.Y.S.2d 73 (1st Dept. 1939); and, *Nucio v. Chou*, 183 A.D.2d 511, 585 N.Y.S.2d 170 (1st Dept. 1992), *lv. to app. denied* 81 N.Y.2d 783 (1993). The Appellate Division, First Department erred in failing to follow established precedent of this Court, the Court of Appeals of New York and the Appellate Divisions, including the First Department itself.[5] Intervention by this

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[5] Defense counsel's conduct and remarks also violated the disciplinary rules under the New York Judiciary Law. The Code of Professional Responsibility provides that:

C. In appearing as a lawyer before a tribunal, a lawyer shall not:

1. State or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

* * * *

3. Assert personal knowledge of the facts in issue, except when testifying as a witness.

(*footnote continued*)

Court is necessary to correct this error and to ensure that the petitioner is afforded due process and equal protection of the law in the state courts of New York and that her federal civil rights are zealously protected.

The misconduct of defense counsel was not an "isolated remark during questioning or summation, but a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined." *Mercurio v. Dunlop, Ltd.*, 77 A.D.2d 647, 430 N.Y.S.2d 140 (2d Dept. 1980). Since the plaintiff's constitutional rights to a fair trial were severely compromised in this case, intervention by this Court is necessary to correct the egregious errors committed.

"All litigants, and particularly one as seriously injured as the plaintiff, deserve more dedication to the fundamental principles of advocacy than was demonstrated by . . . trial counsel." *Laughing v. Utica Steam Engine & Boiler Works*, 16 A.D.2d 294, 296, 228 N.Y.S.2d 44, 46 (4th Dept. 1962). It is respectfully requested that the Supreme Court grant certiorari and intervene in this case in order to send a clear message that trial misconduct by counsel that deprives a litigant of his constitutional right to a fair trial, including due process and equal protection of the law, should not be countenanced by the courts of New York or any other state. This case involved "such a departure 'from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.' " *New York Central Railroad Co. v. Johnson*, *supra*, at 319.

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4. Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

DR 7-106, N.Y. C.L.S. Jud. Appx. Code of Prof. Respons. (1994).

II

This case involves the important novel constitutional question as to whether, in a particular case, a sudden and arbitrary departure, without good cause or explanation, by a state's courts from its own binding precedents violates the constitutional guarantees to due process and equal protection of the law. The Court is invited to decide whether, under the Fifth and Fourteenth Amendments to the Constitution, the state courts' failure in this particular case to adhere to the principles of stare decisis and to apply their own controlling precedents and state law regarding proximate cause and inconsistent verdicts deprived the petitioner, the party harmed by the break from prior authority, of due process and equal protection of the law and whether such failure violated the petitioner's civil rights.

This case represents a marked departure from the rules laid down by the New York Court of Appeals and the Appellate Divisions that where evidence as to an accident is undisputed, proximate cause may be established as a matter of law.

The Court of Appeals has held that where evidence as to an accident is undisputed, the question as to whether any act or omission of defendants was the proximate cause thereof is one for the court and not for the jury. *Tsitsera v. Hudson Transit Corp.*, 14 N.Y.2d 855, 251 N.Y.S.2d 968, 200 N.E.2d 633 (1964). It was held similarly by the Court of Appeals in *Rivera v. City of New York*, 11 N.Y.2d 856, 227 N.Y.S.2d 676, 182 N.E.2d 284 (1962).

The Appellate Division, Second Department has likewise recognized that where an accident is the natural and probable consequence of a defendant's negligence, causation may be established as a matter of law. It has held that in the absence of affirmative proof disputing plaintiff's version of events, a jury verdict in favor of defendants is against the weight of the evidence. *Giuamara v. O'Donnell*, 96 A.D.2d 1049, 466 N.Y.S.2d 692 (2d Dept. 1983).

The decision in the instant case is contrary to these controlling prior authorities. As explained, *supra*, despite the fact that negligence and proximate cause were conclusively proved, in *Gaston v. Viclo Realty Company*, the Appellate Division, First Department ignored binding precedents and refused to determine proximate cause as a matter of law. As the decision in *Gaston* runs afoul of established Court of Appeals and Appellate Division precedents and violates the principles of stare decisis, intervention by this Court is necessary.

In rendering a verdict which found the defendants negligent but found that negligence was not the proximate cause of the plaintiff's injuries, the jury rendered a hopelessly inconsistent verdict. The result in the state courts usurped the power of the Legislature and violated the separation of powers because it clearly contravened N.Y. Civ. Prac. L. & R. 4111(c), which provides that when answers to interrogatories are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall require a new trial. Judgment in accordance with the inconsistent answers should have been precluded as a matter of law and, in this case, deprived the petitioner of due process and equal protection of the law.

The decision in *Gaston* runs afoul not only of state statutes but also of established New York state court precedents which hold that irreconcilably inconsistent jury verdicts may not be allowed to stand. *See*, *Nallan v. Helmsley-Spear*, 50 N.Y.2d 507, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980). In rendering its decision of May 9, 1995, the Appellate Division, First Department did not discuss its prior decision in *Bucich v. City of New York*, 111 A.D.2d 646, 490 N.Y.S.2d 208 (1st Dept. 1985). That case, which was decided in 1985, is directly on point and warrants the relief requested by the petitioner.

In *Bucich*, the jury returned a verdict virtually identical to that returned in the case at bar. The jury found the defendant

negligent but determined that that negligence was not a proximate cause of the incident and resulting injuries to the plaintiff. The trial court denied plaintiff's motion to set aside the verdict as against the weight of the evidence.

The First Department reversed, holding that the jury's findings with regard to negligence and proximate cause were irreconcilably inconsistent. "[T]he jury's response that the defendant was negligent in allowing a defective condition to exist without correction or warning cannot be reconciled with the finding that the condition was not a proximate cause of plaintiff's fall." 111 A.D.2d at 647.

The Appellate Division's statement in *Gaston* that "in view of the fact that plaintiff had gone down the ramp on many prior occasions without falling, the jury could have fairly found that she fell on the occasion not because of any imperfections in the ramp but because she was inattentive" is in direct conflict with its prior decision in *Bucich*. *See also*, *Petrioni v. Grisi*, 155 A.D.2d 366, 547 N.Y.S.2d 641 (1st Dept. 1989), where the court cited to *Bucich v. City of New York*, *supra*.

The Appellate Division's reliance upon *Sancimino v. Brooklyn Union Gas Co.*, 204 A.D.2d 298, 299, 611 N.Y.S.2d 289 (2d Dept. 1994) was misguided. That case stands for the proposition that a jury's verdict should not be set aside as inconsistent and against the weight of the evidence as long as there is "at least one fair interpretation of the evidence to support it." There is simply no reasonable, consistent or fair interpretation of the evidence which supports the conclusion reached by the jury in this case. The defendants failed to introduce any proof that plaintiff was inattentive or negligent in stepping onto the ramp. "A reasonable jury could clearly have concluded that regardless of the reason the plaintiff lost her balance, the lack of a handrail was a proximate contributing cause of her injuries that constituted an unreasonably dangerous condition under the circumstances [citations omit-

ted]." *Portilla v. Rodriguez*, 179 A.D.2d 631, 578 N.Y.S.2d 241 (2d Dept. 1992).

The state courts' decision in the case at bar usurps the power of the Legislature and violates the separation of powers because it ignores N.Y. Civ. Prac. L. & R. 4111(c). It is also in direct conflict with controlling precedents of the Court of Appeals and the Appellate Divisions (including precedents of the First Department itself). Because this sudden and unexplained break with state law and the principles of stare decisis raises serious constitutional issues with regard to whether the petitioner has been denied due process and equal protection of the law, as well as her civil rights under 42 U.S.C. Sec. 1983 *et seq.*, intervention and clarification by this Court are necessary.

III.

Supervision by this Court is also necessary because, as demonstrated, *supra*, in the *Gaston* decision the state courts violated the separation of powers and usurped the power of the Legislature by resurrecting and applying defunct principles germane to a system of contributory negligence, rather than the scheme of comparative negligence required by state law. *See*, N.Y. Civ. Prac. L. & R. 1411. The retroactive application of the discarded system of contributory negligence to petitioner's case resulted in the denial of petitioner's constitutional rights to due process and equal protection of the law as well as violation of her civil rights and the separation of powers doctrine. Intervention by this Court is warranted to ensure that the state courts follow the proper statutory scheme of comparative negligence—which was adopted in New York in 1976 for public policy reasons.

In *Cohen v. St. Regis Paper Co.*, 65 N.Y.2d 752, 492 N.Y.S.2d 22, 481 N.E.2d 562 (1985), the defendant supplier of dry ice (whose fumes caused the plaintiff's decedent to suf-

focate) requested to charge the jury that the decedent's knowledge of the dangers of dry ice was a superseding cause of the accident as a matter of law. The Court of Appeals held that this charge would fail to take into account momentary forgetfulness by the decedent. *A fortiori*, momentary forgetfulness should not be deemed a superseding cause that relieves a defendant of all liability as a matter of law.

In *Derdiarian v. Felix Construction Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980), the Court of Appeals held that even assuming that the plaintiff was momentarily inattentive, this intervening act may not serve as a superseding cause and relieve the defendants of responsibility where the risk of the intervening act occurring is the very same risk which renders the defendant negligent.

In *Flynn v. City of New York*, 103 A.D.2d 98, 478 N.Y.S.2d 666 (2d Dept. 1984), the plaintiff fell down as a result of a hole which he had seen many times before, but to which he was not paying attention at the time of the accident. The trial court applied the doctrine of momentary forgetfulness. The Appellate Division, Second Department held that the doctrine was not operative since it was germane to the former scheme of contributory negligence. However, the Court held that the issue of a temporary lapse of memory is still relevant under a system of comparative negligence. However, this concept is applicable to apportion the liability according to the comparative fault of each party. *Flynn v. City of New York* does not stand for the proposition that the temporary lapse of memory is relevant in determining the issue of defendant's own negligence.

That the courts and jury in *Gaston* were applying standards germane to contributory negligence, and not comparative negligence as required by state statute, is best illustrated by the discussion of the *Potaznick v. City of New York* decision (discussed, *supra*) in *Flynn*, *supra*. As explained in *Flynn*, under a case involving contributory negligence principles, it could

be inferred from a verdict in favor of a defendant that (1) the jury had found no negligence on the part of the defendant or (2) the jury had found that although the defendant was guilty of negligence, plaintiff's momentary lapse of memory constituted contributory negligence, thereby barring any recovery. This is extremely pertinent to the case at bar. In *Gaston*, the jury determined that the defendant was, indeed, negligent. However, at the same time the plaintiff was barred from any recovery, purportedly because of her momentary forgetfulness. The only way the jury could have reached this result, as demonstrated in *Flynn*, was by improperly applying a standard of contributory negligence, which is an "all or nothing" proposition. *Flynn*, 103 A.D.2d at 100. This was highly improper, as contributory negligence is no longer the law in New York State.

The Appellate Division, First Department's Decision and Order is in error because it violated the doctrine of separation of powers by perpetuating the old system of contributory negligence which was improperly applied by the jury and deprived the petitioner of her right to a fair trial and her civil rights under federal statute.

Although there is a movement to reform tort law at the federal and state levels, it is not petitioner's intention herein to argue for or against tort reform. Nonetheless it is not for the state courts to summarily, retroactively, and unconstitutionally change the tort law, to the detriment of the plaintiff herein. Radical changes in tort law, such as the resurrection of the long discarded doctrine of contributory negligence, should not be arbitrarily, retroactively applied in a case at trial and through appeals. Indeed, the New York State Legislature did away with contributory negligence and enacted a system of comparative negligence. Petitioner was entitled was entitled to rely upon said legislation, and said legislation should not be effectively repealed by the courts without comment or authority to do so. Moreover, the highest court of the state should not be allowed to be silent on the question as to

whether the separation of powers doctrine has been violated. Finally, tort reform should not be accomplished by manipulating a jury into throwing an admittedly injured party out of court through the use of repeated, unethical, prejudicial comments of trial counsel, overlooked by the state courts in violation of long-standing precedents of the United States Supreme Court, which have granted new trials under such circumstances. Intervention by this Court is necessary to correct these grievous errors.

CONCLUSION

For all of the foregoing reasons, the petitioner, Ida Gaston, requests the Court to grant this Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, and to accept this case for review.

Respectfully submitted,

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Counsel of Record and
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SUSAN R. NUDELMAN
Of Counsel

March 21, 1996

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 25542/92

IDA GASTON,

Plaintiff-Appellant,

—against—

VICLO REALTY COMPANY and LEO MALLAH,

Defendants-Respondents.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order duly made and entered in the within entitled action and filed in the office of the Clerk of the Appellate Division, First Department on the 9th day of May, 1995.

Dated: New York, New York
October 11, 1995

CHARLES DAVID SEGAL
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(212) 513-0665

To: JEFFREY SAMEL & ASSOCIATES
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SULLIVAN, J.P., ROSENBERGER, ROSS,
ASCH, WILLIAMS, JJ.

54794

IDA GASTON,

Plaintiff-Appellant,

C.D. Segal,

—against—

VICLO REALTY COMPANY, ET AL.,

Defendants-Respondents.

D. Samel

Order, Supreme Court, New York County (Francis Affronti, J.), entered on or about March 23, 1994, which denied plaintiff's motion for judgment notwithstanding verdict, or, in the alternative, a new trial, unanimously affirmed, without costs.

Plaintiff seeks to recover for personal injuries sustained when she fell on a ramp while exiting defendant's building, her theory being that the ramp was not constructed in accordance with sound engineering principles. The jury returned a verdict with interrogatories finding that defendant was negligent but that such negligence was not the proximate cause of plaintiff's injuries. Plaintiff claims that the verdict is both inconsistent and irreconcilable with a reasonable view of the evidence, and that proximate cause should have been found by the court as a matter of law. We disagree. Proximate cause is a matter generally to be resolved by the finder of fact (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312), and a finding there of does not inevitably flow from a finding of

culpable conduct (*Schaefer v Guddemi*, 182 AD2d 808, 809). A jury's verdict should not be set aside as inconsistent and against the weight of the evidence as long as there is at least one fair interpretation of the evidence to support it (*id.*; *Sancimino v Brooklyn Union Gas Co.*, 204 AD2d 298, 299), the court's disagreement with the jury's findings or unhappiness with the harseness of the result being of no consequence (*Brooks v Adams*, 204 AD2d 938, 938). Here, in view of the fact that plaintiff had gone down the ramp on many prior occasions without falling, the jury could have fairly found that she fell on this occasion not because of any imperfections in the ramp but because she was inattentive. We have considered plaintiff's other arguments and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

ENTERED: MAY 9, 1995

/s/ CATHERINE O'HAGUE WOLFE
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—PART 41

PRESENT: Hon. FRANCIS A. AFFRONTI, *Justice*.

INDEX NUMBER.	25542/92
MOTION DATE	3-23-94
MOTION SEQ. NO.	001
TRIAL CAL. NO.	92L-02399

IDA GASTON,

—against—

VICLO REALTY CO.,

The following papers numbered 1 to 13 read on this motion to TRIAL DE NOVO.

	PAPERS NUMBERED
Order to Show Cause—Affirmation—Exhibits	1-9
Answering Affirmation—Exhibits	10-11
Replying Affirmation—Exhibits	12-13

Upon the foregoing papers it is ordered that this motion is Denied in its entirety. Any relief sought by the defendant is also Denied.

Dated March 23, 1994

[ILLEGIBLE]
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Unreported Bench Decision

March 3, 1994

[519] if New York is anything at all like upstate, in all probability, you won't be receiving another notice to appear for quite awhile, having done your service to this community for a period of time.

So, that being said, we'd like to thank you. You are discharged.

There's no requirement that you speak with the attorneys regarding the case. If you'd like to ask them questions you may do so if you happen to see them at the time you're leaving. If they have questions of you, feel free to answer, if you'd like to, but, again, there's no obligation one way or the other that you speak to them or answer questions.

That being said, you are free to leave.

(Jury discharged.)

MS. HAZELTON. Your Honor, at this time, I'd like to move to set aside the verdict as against the weight of the credible evidence.

THE COURT: Any comments?

[520] MR. O'HARE: No, your Honor, I think the verdict as well as the evidence speaks for itself.

MS. HAZELTON: I'd also like to move twofold. I'd like to move for Judgment notwithstanding the verdict.

THE COURT: The Court will deny the applications of counsel for the plaintiff. The Court will determine that there were numerous issues ultimately resolved by this jury, all of which were factual in nature. The jury verdict stands.

Lastly, I thank the attorneys for their conscientious and professional conduct relative to this case, and wish them both well in the future.

MS. HAZELTON: Thank you, your Honor.

MR. O'HARE: Thank you, Ms. Hazelton. Thank you, your Honor.

THE COURT: Ms. Gaston, thank you very much as well.

(Trial concluded.)

* * *

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 25542/92

IDA GASTON,

Plaintiff-Appellant,

—against—

VICLO REALTY COMPANY and LEO MALLAH,

Defendants-Respondents.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of an Order duly made and entered in the within entitled action and filed in the office of the Clerk of the Appellate Division, First Department on the 14th day of September, 1995.

Dated: New York, New York
October 11, 1995

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

M-2744
Index No. 25542/92

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 14, 1995.

Present—Hon. Joseph P. Sullivan, *Justice Presiding*,
Ernst H. Rosenberger
David Ross
Sidney H. Asch
Milton L. Williams, *Justices*.

IDA GASTON,

Plaintiff-Appellant,

—against—

VICLO REALTY COMPANY and LEO MALLAH,

Defendants-Respondents.

Plaintiff-appellant having moved for reargument of, or, in the alternative for leave to appeal to the Court of Appeals from the decision and order of this Court entered on May 9, 1995 (Appeal No. 54794),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is denied, in its entirety, with $100 costs.

ENTER:

/s/ CATHERINE O'HAGUE WOLFE
Clerk

COURT OF APPEALS
STATE OF NEW YORK

1-10
Mo. No. 1403

IDA GASTON,

Appellant,

—v.—

VICLO REALTY COMPANY, et al.,

Respondents.

DECISION December 27, 1995

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.